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8 SHANNON CORTNEY NEVELS,
9 Petitioner,

10 v.
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12 KEN CLARK,
13 Respondent.
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15 Case No. 21-01301 BLF (PR)
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17 **ORDER OF DISMISSAL; DENYING
18 CERTIFICATE OF
19 APPEALABILITY**

20 Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas
21 corpus pursuant to 28 U.S.C. § 2254, seeking to vacate, modify, or strike his restitution
22 pursuant to a new state bill. Dkt. No. 1. The matter was transferred to this district and
23 assigned to the Honorable Magistrate Judge Robert M. Illman. Dkt. No. 4. Judge Illman
24 dismissed the action with leave to amend for Petitioner to address several deficiencies in
25 the petition. Dkt. No. 8. Petitioner filed an amended petition. Dkt. No. 13. The matter
26 was then reassigned to the Undersigned. Dkts. No. 15, 16.

27 **BACKGROUND**
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According to the amended petition, Petitioner was convicted in Alameda County
Superior Court of voluntary manslaughter and use of a firearm in August 2014, and

1 sentenced to 21 years to state prison. Dkt. No. 13 at 2. Petitioner seeks to strike the
2 restitution imposed pursuant to a new state legislation, “Senate Bill 824 & Assembly Bill
3 1869,” and based on his inability to pay under state law. *Id.* at 3-4.

4 For the reasons discussed below, this action must be dismissed.
5

6 DISCUSSION

7 A. Custody

8 This court may entertain a petition for a writ of habeas corpus “in behalf of a person
9 in custody pursuant to the judgment of a State court only on the ground that he is in
10 custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C.
11 § 2254(a). It shall “award the writ or issue an order directing the respondent to show cause
12 why the writ should not be granted unless it appears from the application that the applicant
13 or person detained is not entitled thereto.” *Id.* § 2243.

14 Section 2254(a) uses the term “in custody” twice, with two different requirements.
15 *Bailey v. Hill*, 599 F.3d 976, 978 (9th Cir. 2010). The first usage (i.e., that the petition be
16 filed ““in behalf of a person in custody””) requires that there be a restraint on the
17 petitioner’s liberty. *Id.* at 978-79. The second usage (i.e., that the application can be
18 entertained “only on the ground that he is in custody in violation of the Constitution or
19 laws or treaties of the United States””) requires “a nexus between the petitioner’s claim and
20 the unlawful nature of the custody.” *Id.* at 979-80. For the second requirement to be
21 satisfied, success on the claim must result in a change in the restraint on the petitioner’s
22 liberty. *See id.* at 980 (second custody requirement not satisfied for claim that counsel was
23 ineffective in not objecting to restitution order because success might cause money award
24 to be set aside but would not affect any restraint on petitioner’s liberty).

25 In screening the original petition, Judge Illman advised Petitioner that the challenge
26 to the restitution component of his sentence “fails to satisfy the second custody
27 requirement because success on the claim might cause the restitution fine to be set aside
28 but would not affect any restraint on his liberty.” Dkt. No. 8 at 2, citing *Bailey*, 599 F.3d

1 at 980-81 (imprisoned petitioner failed to satisfy custody requirement for his petition
2 challenging only the restitution component of his sentence because the “elimination or
3 alteration of a money judgment, does not directly impact – and is not directed at the source
4 of the restraint on – his liberty” as long as he has to serve the rest of his prison sentence in
5 the same manner). Petitioner has presented the same restitution claim from his original
6 petition in the instant amended petition. As he was already advised, Petitioner cannot
7 proceed with this claim.

8 Because Petitioner fails to satisfy the “in custody” requirement, there is no habeas
9 jurisdiction present over this matter. The instant petition must be dismissed for lack of
10 jurisdiction. *See* 28 U.S.C. §§ 2241(c), 2254(a).

11 **B. Timeliness and Exhaustion**

12 Petitioner was also advised that the action appeared untimely because it was filed
13 many years after the expiration of the one-year statute of limitations following his 2014
14 conviction. Dkt. No. 8 at 2-3; *see* 28 U.S.C. § 2244(d)(1). The petition also appeared to
15 be unexhausted because Petitioner did not present the highest state court available with a
16 fair opportunity to rule on the merits of each and every claim he sought to raise in federal
17 court; he petition indicated that he only filed a state habeas petition with the Superior
18 Court of Alameda County. *Id.*; *see* 28 U.S.C. § 2244(b),(c); *Rose v. Lundy*, 455 U.S. 509,
19 515-16 (1982). Petitioner was directed to address these deficiencies in an amended
20 petition. Dkt. No. 8 at 3. Petitioner has failed to address either of these issues in the
21 amended petition. Dkt. No. 13. Accordingly, it appears that the action is subject to
22 dismissal as untimely and unexhausted.

23
24 **CONCLUSION**

25 For the foregoing reasons, this habeas action is **DISMISSED** for lack of
26 jurisdiction, as well as for being untimely and unexhausted.

27 No certificate of appealability is warranted in this case because a reasonable jurist
28 would not find the dismissal of this petition debatable or wrong. *Slack v. McDaniel*, 529

1 U.S. 473, 484 (2000).

2 **IT IS SO ORDERED.**

3 Dated: September 20, 2021


BETH LABSON FREEMAN
United States District Judge

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United States District Court
Northern District of California

25 Order of Dismissal
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